United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

75-7663

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-7663

AJAX HARDWARE MANUFACTURING CORPORATION

Plaintiff-Appellant,

v.

INDUSTRIAL PLANTS CORPORATION

Defendant-Appellee.

On Appeal From The United States District Court
For The Southern District of New York

PLAINTIFF-APPELLANT'S PETITION FOR REHEARING

POLETTI FREIDIN
PRASHKER FELDMAN & GARTNER
Attorneys for Plaintiff-Appellant
1185 Avenue of the Americas
New York, New York 10036
(212) 730-7373

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AJAX HARDWARE MANUFACTURING CORPORATION,	:	
Plaintiff-Appellant,	:	Docket No. 75-7663
v.	:	
INDUSTRIAL PLANTS CORPORATION,	:	
Defendant-Appellee.	:	

PLAINTIFF-APPELLANT'S PETITION FOR REHEARING

Summar, Statement

With full awareness of the long and careful consideration which the Court gave to the numerous points urged on appeal, appellant petitions for rehearing on the single point which was decided against it in the Court's decision of July 13, 1977, that the district court's order for a complete new second trial, although reversible error on the ground on which it was made, nevertheless can be sustained on a different ground. To leave things as they are and proceed to a third trial would mean acquiescence in the extraordinarily unfair procedural processing of this case.

Normally, it is salutary practice for an appellate court to defer to the judgment of a trial judge as to the

need for a complete new trial, as contrasted with a partial trial on the issue of damages. The rule announced by this Court, however, to sustain the action of the trial judge here, which this Court ruled was reversible error on the ground as stated by the district court, would make any deliberately induced and properly explainable inadequate award of damages the excuse for vacating a prior, separate, and independent finding of liability.

Appellant therefore urges this Court to reconsider and reverse its determination that the district judge here was correct in ordering a second complete trial. It is a salutary practice to subject a plaintiff who has prevailed on causes of action to three complete jury trials when in the first jury trial the jury found that the defendant was liable, and it was only because of errors committed during the trial by the district judge and statements by defendant's attorney urging the jury to return an inadequate award, that it was even possible to argue that that determination was tainted. The same district judge who determined that, in the interests of justice, it was necessary to have a full new trial then proceeded to conduct that second trial, as this Court has now held, in an unjust way, removing from jury consideration, without justification, three principal issues in the case --

negligence, fraud, and punitive damages, and improperly restricting the breach of contract claim.

Plaintiff has been subjected to tremendous expense and it has had its meritorious claims at risk before two juries. We submit that before this Court orders plaintiff to subject its claims once again to another jury, it reconsider whether it is indeed justified in concluding that the district judge could, and would, properly have exercised discretion to order a complete new trial on the "possibility" that there was a compromise of the liability and damage issues, although there is no reason to doubt that the jury followed the Court's instructions, written on the special verdict form, and found liability unanimously before it considered any question of damages.

Points Justifying Reargument

In making its determination that even though the order for a complete new trial could not be sustained by the finding in this case that there was a compromise of liability and damages in the first trial, it could be sustained because there might have been such a compromise, this Court has overlooked or misapprehended the following:

1.(a) Schuerholz v. Roach, 58 F.2d 32 (4th Cir. 1932), cited by the Court in support of the proposition that

"A new trial limited to the issue of damages requested by Ajax would have been a proper remedy only if the district court had been satisfied that the jury properly determined the issue of liability" (Op., p. 4709) does not put that burden of satisfying the court on the proponent of the liability verdict. On the contrary, the case holds that an award of $625.00 as damages for the loss of an eye was so "grossly unjust and inadequate" that it "must have been so regarded by the very jurors who rendered the verdict and it can give rise only to the inference that it did not represent a fair estimate of the plaintiff's loss, but merely a difference of opinion among the jurors as to defendant's liability . . ." 58 F.2d at 34 (emphasis added) (Appellant's brief, pp. 41-42).

(b) In subsequent cases, the Fourth Circuit has made it very clear that the doctrine of Schuerholz v. Roach calls for a complete new trial only when an award of damages is so grossly inadequate that the inference is inescapable that the finding of liability could not have been properly made. That inference arises only when the jury must have been aware that its award of damages could not possibly compensate for the damages which clearly resulted from the liability it was purporting to find.

(c) Thus, in both Young v. International Paper Co., 322 F.2d 820 (4th Cir. 1963), and Great Coastal Express, Inc. v. International Brotherhood of Teamsters, 511 F.2d 839 (4th Cir. 1975), the Fourth Circuit explains the holding of Schuerholz as not requiring an inference of a compromise merely because the award of damages was inadequate; and it specifically says that it is improper to order a new trial on liability as well as damages on "the surmise that the amount of [the] verdict was the product of a compromise to resolve doubt as to liability," (322 F.2d at 823; emphasis added) and that it "has found a new trial on all issues to be required where a totally inadequate verdict was rendered which could only have been a sympathy or compromise verdict . . . But where there is no substantial indication that the liability and damage issues are inextricably interwoven,[1] or that the first jury verdict was the result of a compromise of the liability and damage questions, a second trial limited to damages is entirely proper" (511 F.2d at 846; emphasis added) (Appellant's brief, pp. 43-45).

(d) This case simply does not meet the Schuerholz-Young-Great Coastal Express test. This Court itself has held

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1. This Court, of course, has held that "In the instant case liability and damages were readily severable questions." (Op., p. 4709, fn. 2)

that there is a perfectly reasonable explanation of why the first jury rendered an inadequate verdict, which does nothing to raise any doubt about the propriety of its liability verdict. Therefore, it cannot be said that the verdict must have been regarded as inadequate by the jurors, nor can it give rise only to the inference that it did not represent a fair estimate of the plaintiff's loss, nor yet furnish "substantial indication" that there was a compromise. On the contrary, the instructions given to the jury by the district court and the urging by the defendant's attorney that the jury deduct unspecified and speculative amounts from any proved damages explain the inadequate award without raising any question about the prior finding of liabiity.

2.(a) Hatfield v. Seaboard Air Line R. Co., 396 F.2d 721 (5th Cir. 1968), the other case which the Court cites in support of its ruling, does not at all justify that ruling. As the Court acknowledges, the facts in Hatfield were "extreme," in that in the face of undisputed evidence of special damages of $2,795.75, and proof of serious permanent physical injury, the same jury which found the defendant negligent and liable for those injuries awarded plaintiff $1.00 as damages.

(b) In setting aside the verdicts and directing a complete new trial, the Court in Hatfield said that those facts "point irrefutably to some kind of jury impropriety which could not help but affect the verdict as a whole." "It is highly unlikely," said that Court, "that the jury, upon proper deliberation, found the first four interrogatories [including the finding of defendant's negligence] in accordance with the trial court's instructions and then, in contravention of those same instructions, refused, either through misunderstanding or through willfulness, to assess the damages ensuing. On the contrary, the nominal damage award can be seen only as the result of either a compromise of one of the liability issues, or as an attempt to render a verdict for Seaboard, with Seaboard paying the costs.[2] In either event, the misconduct necessarily contaminated the entire verdict, and precludes a new trial on the damage issue alone."[3] (396 F.2d at 724; emphasis added).

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2. Obviously, the second alternative is a form of compromise verdict, so the Court's statement means that the nominal damage award could only have been the result of a compromise; that Court did not hold, as this Court suggests, that where "conflicting inferences" preclude conviction that the erroneous damage finding clearly had no effect on the liability findings, a complete new trial was necessary.

3. When quoting from the Hatfield decision, this Court overlooked the underlined words above, which clearly make Hatfield a case which supports a complete new trial only when there is no explanation for an inadequate damage award other than impropriety affecting the finding of liability.

(c) Obviously, where a jury renders a verdict for the plaintiff for $1.00 in a case where the evidence shows substantial injuries, the inference must arise that the jury did not believe that the defendant was liable for those injuries, and for some reason decided nevertheless to award a token verdict to the plaintiff. No such inference is possible in this case. There is nothing to show that the jury did not follow its explicit, written instructions and determine the separate and special verdicts as to liability before it even considered the extent of damages. The amount of damages which it found, $70,000.00, is not a token and reinforces the conclusion that the jury properly found the defendant liable.[4] The perfectly understandable reason for the inadequacy of the damage verdict was acknowledged by this Court when it said that because of the district judge's instructions "the jury might well have understood . . . that it was permissible to award any sum that did not exceed the stated limit." (Op., p. 4708).

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4. See d'Hedouville v. Pioneer Hotel Co., 552 F.2d 886, 897 (9th Cir. 1977), where the Court quoted with approval Justice Traynor's statement in Hamasaki v. Flotho, 39 Cal. 2d 602, 248 P.2d 910 (1952), that, "As a general rule, it is only when the verdict allows a substantial, even though inadequate amount for general damages that it can reasonably be concluded that the jury's error related solely to the damages issue."

(d) That stated limit, $161,895.75, was not understood by defendant's counsel, by the court, or by the jury during the trial to be the liquidated amount of damages. In fact, defendant's counsel did everything possible during the trial to make the jury believe that it was free to award any sum it chose within that limit. (Appellant's brief, pp. 36-38). It was only after a damage verdict in accordance with those guidelines[5] had been returned that the defendant's attorney, in order to furnish ground for attacking the verdicts, conceded that the amount of damages was liquidated and that the only amount which the jury could properly have awarded was $161,895.75. It is impossible to see how that change of position after the trial could justify a change in the district judge's perception of what the jury had done and so justify a possible exercise of discretion based on the belief that the jury might not have found liability properly, particularly when immediately after the verdicts were returned the district judge saw nothing wrong with them (Appellant's brief, p. 39). There is an unbridgable gap between a belated concession that the amount of damages was liquidated at $161,895.75 and an assertion that the $70,000

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5. In great contrast to Hatfield, to sustain the liability verdict here does not require the assumption that the jury followed the district court's instructions in finding liability, but did not follow its instructions in finding damages. It is precisely because it reasonably appears that the jury did follow the district court's instructions on damages, as this Court has held, that its award was inadequate.

amount found by the jury at a time when it had been told that it could find as damages any amount up to $161,000.00 establishes or even raises the possibility that there was a compromise on the question of liability and damages.

(e) The surely unintended result of the Court's ruling is to reward the defendant, who succeeded in improperly confusing the jury as to the measure of damages (Appellant's brief, p. 37), with a new trial as to liability as well. Other defendants may be expected to use the same strategy if this Court's approval of a complete new trial is allowed to stand. So long as a district judge is free to order a complete new trial wherever there is a "possibility" that the jury's inadequate damage award resulted from a compromise -- despite the concurrent, and more reasonable likelihood that the size of the award was a direct result of the defendant's own suggestions and the court's instructions to the jury -- a defendant has nothing to lose and everything to gain by attempting to confuse the jury into returning an inadequate award which then can be argued to justify overturning a possible adverse finding on liability.

(f) The particular unfairness of that result is apparent in this case where defendant's liability for negligence was established at trial by virtually uncontradicted evidence. This Court has now affirmed Ajax's contention that defendant would be liable for negligence

even for the fair market value appraisal figures it delivered "by showing Industrial's failure to research the assumptions upon which they were based and by showing the depressed conditions in the watch machinery market." (Op., pp. 4711-12). There was no dispute that, whatever else Industrial supplied, it gave fair market value figures; defendant did not contest by any evidence either the method by which those figures were derived or the actual depressed conditions in the watch machinery market (See Appellant's brief, pp. 13-17). Despite that record which not only supports the jury's finding as to liability, but may well have been sufficient for a directed verdict in Ajax' favor, the separate verdict of liability has been overturned, without any finding by the district court or this Court that there was reason to doubt that separate and supportable determination of liability.

3. (a) The Court justifies its ruling by the assumption that the district court would have exercised its discretion to direct a complete new trial, but the district court did not exercise discretion. On the contrary, it believed itself compelled to order a complete new trial because of two critical findings, both contrary to decision of this Court now: (1) that the verdicts of liability and damages were a compromise, and (2) that those issues were intertwined .

(b) If the district court had had the benefit of this Court's decision in this case that (1) it was impermissible to find as a fact that there was a compromise; (2) liability and damages were readily severable questions; (3) there was only the "reasonable possibility" that the verdicts were the result of compromise; and (4) there was "an equally reasonable and perhaps even better explanation" for the verdicts, namely, that the jury understood the district court's instructions to mean that "it was permissible to award any sum that did not exceed the stated limit," in other words, that the jury was meticulously following the court's instructions, including the instruction to determine the question of liability before considering the amount of damages, it cannot be said that the district judge would have exercised his discretion to order a complete new trial.

(c) On the contrary, in its Memorandum and Order on Post-Trial Motions (A-108), the district court said, "I have attempted to arrive at a conclusion which would avoid the necessity of a retrial." Given the foundation of this Court's four-fold decision, outlined above, there would have been no "necessity" for the district court to order anything but a partial trial on the issue of damages. Clearly, since the district court expressly stated its desire to avoid a retrial, it cannot be assumed that it would nevertheless have ordered a retrial when there was no need for it.

(d) Moreover, as appears from the preceding two points, the mere possibility of a compromise verdict is not sufficient ground for a complete retrial. As Moore states the principle, ". . . if a new trial is granted because of the inadequacy of the verdict and it appears that the verdict was [not, might have been] the product of an illegal compromise or other misconduct on the part of the jury, the court must grant a new trial on all the issues ..." 6A Moore's Federal Practice ¶59.06, at 59-83. To grant a complete retrial on the mere possibility of a compromise, which, incidentally, is attenuated almost to nonexistence by recognition that the jury believed that it had every right to award the amount of damages it did, could forcefully be argued to be an abuse of discretion. In any event, there is no precedent for the imputation by this Court of a discretion which is peculiarly that of the district judge, and which was not exercised in this case. See, e.g., Magee v. General Motors Corp., 213 F.2d 899 (3rd Cir. 1954); American Pipe & Construction Co. v. Utah, 414 U.S. 538, 560 (1974); Hampton v. Magnolia Towing Co., 338 F.2d 303, 307 (5th Cir. 1964). Rather than imputing a discretion to the district judge which he did not exercise, this Court should adhere to the cases cited above which establish that a mere possibility of a compromise does not justify a complete new trial.

Conclusion

In view of the explanation of the inadequacy of the jury's award accepted by this Court, there remains no "substantial indication" that there was a compromise of the liability and damage issues. Without such indication, the cases do not justify an order for a complete new trial on the mere possibility that there may have been a compromise. This Court, therefore, should put an end to this lamentably extended and expensive litigation and, in accordance with the first jury's proper finding of liability and defendant's subsequent concession that the damage award was inadequate, remand for a new trial on damages only.[6]

Respectfully submitted,

POLETTI FREIDIN
PRASHKER FELDMAN & GARTNER

By _____
Murray Gartner
A Member of the Firm
Attorneys for Plaintiff-Appellant
1185 Avenue of the Americas
New York, New York 10036
(212) 730-7373

Dated: New York, New York
July 27, 1977

Of Counsel:

Edward Brill

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6. Since this Court has not expressed itself on the third alternative, entry of judgment for the now conceded liquidated amount of $161,895.75 plus interest because there is no issue to try, presumably that question would be left for initial determination by the district court.

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 1977 on behalf of Plaintiff-Appellant Ajax Hardware Manufacturing Corporation I caused a true copy of the within Petition For Rehearing to be served by United States mail, postage prepaid, upon Monasch Chazen & Stream, 777 Third Avenue, New York, New York 10017, attorneys for Defendant-Appellee in this action.

Edward A. Brill

Edward A. Brill
Attorney